

**A ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO  
C-02-2082-09 OF 2012

**B** CLEMENT SKINNER, MAH WENG KWAI JJCA AND HAMID  
SULTAN J  
23 JANUARY 2013

**C** *Civil Procedure — Subpoena — Setting aside — Rules of the High Court 1980  
O 92 r 4 — Subpoena issued to compel witness to produce documents — Whether  
writ of subpoena issued with mala fide intent — Right to issue subpoena — Onus  
to show materiality of witness — Test to compel*

**D** In the present appeal, the appellant/plaintiff appealed against the decision of  
the High Court which allowed the respondents' (witness) application under  
O 92 r 4 of the Rules of the High Court 1980 and/or inherent jurisdiction of  
the court to set aside the subpoena served on one Tan Yeo Hwa, an employee of  
Alliance Investment Bank ('AIBB') and in dismissing the appeal with costs. The  
**E** facts were that the appellant was interested in employing the defendants as  
remisiers who were then working as paid dealers representatives in AIBB. The  
defendants have signed a letter of offer for a position as a remisier with the  
plaintiff. In the High Court, one of the main issues to be tried was whether  
there was a concluded contract between the plaintiff and the defendant.  
**F** During the trial, the plaintiff adduced evidences of alleged loss of future  
earnings and evidence of the cost and revenue projection of the plaintiff. The  
plaintiff issued a subpoena requiring the witness to produce certain  
documents. The witness filed an application to set aside the subpoena on the  
grounds, inter alia, that the documents were confidential and not relevant; and  
**G** the witness had no personal knowledge of the plaintiff's claim against the  
defendants and the writ of subpoena was issued with mala fide intent. The  
High Court allowed the application and hence, the present appeal.

**Held**, dismissing the appeal with costs:

- H** (1) A litigant under the rules of court has a right to issue a subpoena and  
sustain the same provided it is not oppressive or an abuse of process of  
court and is relevant and material to the case and is not frivolous or  
scandalous. It is equally well-settled in every case, the onus is on the party  
issuing the subpoena to show the materiality of the witness for the just  
**I** decision of the case, in that it outweighs any oppression that may be  
caused to the party objecting (see para 7(d)–(e)).
- (2) It is well-settled that in an appeal against the exercise of discretion by a  
judge, the initial function of the appellate court is one of review only,

there being no original discretion vested in the appellate court. The appellant had to demonstrate that an error in the exercise of discretion had occurred. The appellant had not demonstrated that an error in the exercise of discretion had indeed occurred (see para 7(b)).

- (3) The test to compel is a strict test. The witnesses who can be compelled are those 'who have seen the facts or who know the facts' and this will usually relate to liability and rarely to quantum. Such strictures may not be applicable if the witness voluntarily gives evidence on the issue of liability or quantum (see para 7(c)).

#### [Bahasa Malaysia summary]

Dalam rayuan ini, perayu/plaintif merayu terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden-responden (saksi) di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidang kuasa inherens mahkamah untuk mengetepikan sepina yang diserahkan ke atas seorang yang bernama Tan Yeo Hwa, pekerja Alliance Investment Bank ('AIBB') dan dalam menolak rayuan dengan kos. Fakta adalah bahawa perayu berminat untuk mengambil defendan-defendan sebagai remisier yang pada masa itu bekerja sebagai wakil-wakil peniaga berlesen di AIBB. Defendan-defendan telah menandatangani surat tawaran untuk jawatan sebagai remisier dengan plaintiff. Di Mahkamah Tinggi, salah satu daripada isu utama untuk dibicarakan adalah sama ada terdapat kontrak muktamad antara plaintiff dan defendan. Semasa perbicaraan, plaintiff mengemukakan keterangan kehilangan pendapatan masa depan yang didakwa dan keterangan ramalan kos dan hasil plaintiff. Plaintiff mengeluarkan sepina mengkehendaki saksi mengemukakan dokumen-dokumen tertentu. Saksi memfailkan permohonan untuk mengetepikan sepina atas alasan, antara lain, bahawa dokumen adalah sulit dan tidak relevan; dan saksi tidak mempunyai pengetahuan peribadi mengenai dakwaan plaintiff terhadap defendan-defendan dan writ sepina dikeluarkan dengan niat mala fide. Mahkamah Tinggi membenarkan permohonan dan maka rayuan ini.

#### **Diputuskan,** menolak rayuan dengan kos:

- (1) Litigan di bawah peraturan mahkamah mempunyai hak untuk mengeluarkan sepina dan mengekalkannya dengan syarat ia tidak menindas atau menyalahguna proses mahkamah dan adalah relevan dan material kepada kes dan bukan remeh atau bersifat skandal. Adalah ditetapkan dalam setiap kes, beban adalah ke atas pihak yang mengeluarkan sepina untuk menunjukkan pentingnya saksi tersebut untuk keputusan adil kes tersebut, oleh itu ia mengatasi apa-apa penindasan yang mungkin disebabkan kepada pihak yang membantah (lihat perenggan 7(d)–(e)).
- (2) Adalah ditetapkan bahawa dalam rayuan terhadap pelaksanaan budi

- A bicara oleh hakim, fungsi permulaan mahkamah rayuan adalah untuk menyemak sahaja, memandangkan tidak terdapat budi bicara asal yang diletakhakkan dalam mahkamah rayuan. Perayu terpaksa menunjukkan bahawa kesilapan dalam pelaksanaan budi bicara telah berlaku. Perayu tidak menunjukkan bahawa kesilapan di dalam pelaksanaan budi bicara telah berlaku (lihat perenggan 7(b)).
- B (3) Ujian untuk memaksa adalah ujian ketat. Saksi-saksi yang boleh dipaksa adalah mereka yang ‘who have seen the facts or who know the facts’ dan ini selalunya berkaitan kepada liabiliti dan jarang kepada kuantum. Sekatan sedemikian mungkin tidak digunapakai jika saksi secara rela memberi keterangan atas isu liabiliti atau kuantum (lihat perenggan 7(c)).]
- C

**Notes**

- D For cases on setting aside, see 2(A) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8190–8192.

**Cases referred to**

- Davy v Garrett* (1878) 7 Ch D 473, CA (refd)
- E *Harmony Shipping Co SA v Davis and Others* [1979] 3 All ER 177, CA (refd)  
*Ismail v Hasnul; Abdul Ghafar v Hasnul* [1968] 1 MLJ 108, FC (refd)  
*Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155, CA (refd)
- F *Ong Jane Rebecca v Lim Lie Hoa and others (Lim Lie Hoa, third party)* [2003] 1 SLR 457, HC (refd)  
*Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858, CA (refd)  
*Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679, SC (refd)

**Legislation referred to**

- G Rules of the High Court 1980 O 92 r 4

**Appeal from:** Suit No 22–113 of 2010 (High Court, Kuantan)

- H *Alex De Silva (Adlan Hadi Mohamed Yusof with him) (Bodipalar Ponnudurai De Silva) for the appellant.*  
*KC Wong (Teoh Alvare with him) (Zul Rafique & Partners) for the respondent.*

**Hamid Sultan J (delivering judgment of the court):**

- I [1] We heard the appeal of the appellant/plaintiff in respect of the decision of the learned High Court judge who allowed the respondents’ (witness) application under O 92 r 4 of the Rules of the High Court 1980 and/or inherent jurisdiction of the court to set aside the subpoena served on Tan Yeo

Hwa an employee of Alliance Investment Bank ('AIBB') on 27 November 2012 and dismissed the appeal with costs. The draft judgment was approved by my learned brothers, Datuk Clement Allan Skinner and Dato' Mah Weng Kwai earlier. This is our judgment. A

[2] It is not in dispute that the subpoena was issued for the purpose of producing the documents and also to give evidence. B

#### THE BRIEF FACTS

[3] The appellant was interested in employing the defendants as remisiers who were then working as 'paid dealers representatives' in AIBB and not remisiers. The defendants have signed a letter of offer for a position as a remisier with the plaintiff. One of the main issues to be tried before the High Court is whether there was a concluded contract between the plaintiff and the defendants. It will follow if there is a breach then the issue will be whether the plaintiff did suffer any loss or damage. C D

[4] During the trial the plaintiff has adduced evidence of alleged loss of future earnings and has adduced evidence of the cost and revenue projection of the plaintiff based on the gross commission of the seven defendants (excluding the fourth and fifth defendants). Notwithstanding the projection relates to the year 2008 and April 2009, the plaintiff has issued subpoena requiring the witness to produce documents relating to defendants' commission from the date of their appointment as remisier till date as well as documents which state the percentage of commission paid by AIBB to the defendants from year 2010. E F

[5] It must be noted that the application to set aside the subpoena was filed by the witness through the defendants' firm of solicitors, on the grounds, inter alia, that (a) documents are confidential and not relevant; and (b) the witness has no personal knowledge of the appellant's claim against the defendants and the writ of subpoena was issued with mala fide intent. G

[6] The learned High Court judge agreed with the submission of the defendants' counsel and allowed the application and hence this appeal. H

[7] We have read the appeal record and the submission of the parties in detail. Both learned counsel have submitted on the facts and law in detail. The court is grateful. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the appellant, we take the view that the appeal must be dismissed. Our reasons, inter alia, are as follows: I

- (a) it is well settled that the appellate court will not ordinarily interfere with

- A the exercise of discretion of a trial court in relation to procedural and/or interlocutory matters (see *Davy v Garrett* (1878) 7 Ch D 473);
- (b) the appeal relates to an interlocutory procedural order and exercise of discretion. It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the categories of cases where appellate interference is warranted (see *Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v Raja Segaran all S Krishnan* [2002] 3 MLJ 155);
- B
- C
- (c) the law in respect of setting aside of subpoena is well settled. Any witness who has seen the facts or who knows the facts can be compelled to assist the court and should assist the court by giving evidence unless the exception applies. In *Harmony Shipping Co SA v Davis and Others* [1979] 3 All ER 177, the English Court of Appeal asserted that aside from issues of oppression the subpoena must be obeyed. The court stated:
- D
- E That principle is established in the case of a witness of fact: for the plain, simple reason that the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court by giving that evidence ...
- F In this particular case Mr Davis has been subpoenaed by the defendants. It seems to me that that is very right and proper. It was suggested that the subpoena should be set aside. As far as I know, no subpoena ad testificandum has ever been set aside except at the instance of the witness himself when he has claimed that it would be oppressive to make him answer that subpoena. Otherwise a subpoena ad testificandum must be obeyed by the witness. He must come to the court and be ready to give his evidence and answer such questions as the judge permits to be answered.
- G
- We must say here that the above case and many other cases in this area of jurisprudence cannot be taken as the authority to compel persons who have no nexus to the case or where their evidence will not be relevant or admissible to give evidence readily for the purpose of assisting the litigants (as opposed to assisting the court to arrive at the truth) that too to arrive at the quantum. The test to compel is a strict test. The witnesses who can be compelled are those 'who have seen the facts or who know the facts' and this will usually relate to liability and rarely to quantum. Such strictures may not be applicable if the witness voluntarily gives evidence on the issue of liability or quantum;
- H
- I (d) in the Malaysian context a litigant under the rules of court has a right to issue a subpoena and sustain the same provided it is not oppressive or an abuse of process of court and is relevant and material to the case and is not frivolous or scandalous (see *Ong Jane Rebecca v Lim Lie Hoa and others (Lim Lie Hoa, third party)* [2003] 1 SLR 457). In *Ismail v Hasnul; Abdul*

*Ghafar v Hasnul* [1968] 1 MLJ 108, Raja Azlan Shah FCJ (as HRH then was) in relation to a setting aside application observed:

The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a non entity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse.

- (e) it is equally well settled in every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting (*Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679). In the instant case the learned judge has given her grounds of decision. The appellant has not demonstrated to our satisfaction that an error in the exercise of discretion has indeed occurred. We also find it difficult to fathom how this witness will be relevant and material to the plaintiff's case, be it on liability or quantum.

[8] For reasons stated above, the appeal is dismissed with costs. The appellant to pay the respondent costs in the sum of RM10,000.

[9] We hereby order so.

*Appeal dismissed with costs.*

Reported by Afiq Mohamad Noor

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